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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 507

SAMUEL LEONARD BERENBEIM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 508

BEN SCHECTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1041–1050) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 5, 1947 (R. 1050–1051),

and a petition for rehearing was denied December 10, 1947 (R. 1059). The petition for a writ of certiorari was filed January 2, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. In determining whether an insurance contract was made more than 30 days before the insured entered the armed forces, whether the significant date is the date on which the application for insurance was made or the antedated date which appears on the face of the policy.

2. Whether the decision below is in conflict with *Terry* v. *United States,* 131 F. 2d 40 (C. C. A. 8).

3. Whether there is sufficient evidence showing that the defendants made false reports to the Veterans' Administration and conspired to defraud the United States.

4. Whether the instruction to the jury on the issue of good faith was incorrect, and, if so, whether the failure of petitioners to object to it on the ground now asserted forecloses them from attacking it here.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 27–30.

STATEMENT

On December 14, 1945, petitioners and the defendants Mankoff and Stoeffler were indicted in the United States District Court for the District of Colorado in one count charging that they unlawfully conspired to defraud the United States and to violate the false claims statute (Section 35 (A) of the Criminal Code, *infra*, pp. 29–30), in violation of Section 37 of the Criminal Code, *infra*, p. 30 (R. 14–53). The indictment alleged that the defendants agreed that they would, by the fraudulent means set forth, cause the Veterans' Administration to guarantee, pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act, the payment of premiums on certain life-insurance policies which the defendants caused to be issued to persons who had entered or were about to enter the armed forces; that the defendants falsely made it appear that the policies were in force on a premium-paying basis at the time of the application for benefits under the Act and that a premium had been paid not less than 30 days before the insured entered the armed forces; that if the true facts had been made known to the Veterans' Administration the premiums on the policies would not have been guaranteed; and that the conspiracy contemplated impairing and obstructing the Veterans' Administration in the exercise of its governmental function in administering the Soldiers' and Sailors' Civil Relief Act.

Having been convicted by a jury (R. 64), petitioner Berenbeim was sentenced to imprisonment for two years and to pay a fine of $2,500 (R. 65). Petitioner Schechter was sentenced to imprisonment for two years and to pay a fine of $1,000 (R. 65–66). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgments were affirmed (R. 1050–1051).

The issues presented by the petition for a writ of certiorari are mainly questions of law which may be resolved without a detailed analysis of the evidence adduced at the trial. Accordingly, we shall confine the Statement to a generalized summary of the conspiracy, as shown principally by the Government's evidence, and a sample illustration in detail of how it operated in a specific instance.

Preliminarily, it may be noted that as one phase of its effort to relieve members of the armed forces from civil obligations until they were restored to civil life, the Congress authorized the Veterans' Administration to guarantee the payment of premiums on certain life insurance policies, not in excess of $10,000. The guarantee provisions (*infra*, p. 27) were confined, *inter alia*, to a contract of insurance (1) "which [was] in force on a premium-paying basis at the time" the application for benefits under the Act was made, and (2) "which was made and a premium paid thereon * * * not less than thirty days before the date the insured entered into the mili-

tary service" (sec. 400 (a)). Consistently with sections 402 and 407 of the Act, the Veterans' Administration prepared forms for use in applying for benefits under the Act.[1] Form 380 (8 F. R. 2760) was required to be submitted by the insured, and it required information which would enable the Veterans' Administration to determine whether the insured was eligible for the benefits provided by the Act. In practice, Form 380 was submitted by the member of the armed forces to the Veterans' Administration and a copy was forwarded to the insurer. Upon receipt of such a form, the insurer submitted Form 381 (8 F. R. 2761) to the Veterans' Administration, which furnished that agency with pertinent information concerning the policy If, upon consideration of the information shown by the two forms, the Veterans' Administration determined that the policy was within the terms of the statute, the Administration sent its Notice of Approval to the insurer and insured, and for the duration of the insured's military service and two years thereafter the Government guaranteed the payment of premiums.

Petitioner Berenbeim, a member of the bar of Colorado (R. 491), was the "State Manager" for the Ancient Order of United Workmen of Kansas, a fraternal benefit association, in the sale of insurance in Colorado (see R. 79-87). Petitioner

[1] Regulations also were promulgated (7 F. R. 10232–10235).

Schechter and defendant Mankoff were subagents who sold insurance under Berenbeim's direction (R. 496–498, 407). Defendant Stoeffler worked for Schechter in the sale of such insurance (R. 413, 565). On all insurance which was sold, Berenbeim received a commission of 82½% of the first year's premium and a diminishing rate for premiums paid in the following years (R. 81, 406).[2] He paid a commission of 70% of the first year's premium to Schechter and Mankoff for policies which they sold (R. 407, 420, 623). Schechter had a special arrangement with Stoeffler (R. 714, 413).

The ultimate objective of the conspiracy was to secure the Veterans' Administration guarantee of premiums on policies of insurance which were sold by petitioners and their codefendants to young men immediately before they entered the armed forces. In operation the scheme worked as follows:

Mankoff, Stoeffler, and Schechter, the salesmen, sought out young men who had been called for military service and who were on brief furloughs before reporting for active duty. They represented to these young men that they could obtain insurance at no cost to themselves; that the premiums would be guaranteed by the Government; that two years after they were released from mili-

[2] These terms were later modified to pay Berenbeim an additional $5 for each $1,000 of insurance which was sold (R. 84–85).

tary service, they could elect whether to keep the policy and commence paying the premiums; and that in any event they would be under no obligation to pay the premiums which accrued while the guarantee was in effect (see, e. g., R. 197–198, 210–212, 230–231, 246–247). Whenever a prospect agreed to the proposition, the agent would have him sign three different blank forms, an application for an insurance policy, a medical report and an application to the Veterans' Administration to bring the policy under the gurantee provisions of the Act (see e. g., R. 199–201, 212–213, 232–233, 247–248). In addition, the prospect was given a form which he was to forward to the agent as soon as he reported for active duty, showing his serial number, rank, organization, identification number, branch of service and the date on which he entered active duty (see, e. g., R. 201, 212, 258). The agents secured the routine information from the applicant as to his birthdate, beneficiary, etc. (R. 231, 252, 275). The applicant never paid any premiums (see, e. g., R. 214–215, 233, 247, 279). Instead, the agent paid the monthly premiums until the guarantee was obtained (R. 582, 693, 707, 720), after which no further premiums were paid.

The agent filled in the application for insurance, which the applicant had signed in blank, in each case requesting a $10,000 policy (the maximum for which a guarantee was available under the

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Act), and in each case dating the application as of the first day of the month regardless of the date on which it was actually made (see R. 768–769, 784–785, 816–817), so as to show that the policy had been in existence more than 30 days before the insured entered the armed forces (see R. 684). The medical form was completed by the agent and a doctor who worked with him, but who did not see the applicants (R. 567–568, 592; see also, e. g., R. 198, 785–792, 212, 849–857). The application and medical form were then submitted to Berenbeim, who in turn forwarded them to the home office of the company (R. 498). In due course the policies issued and were forwarded to Berenbeim (R. 135, 498). Except in a few cases, the policies were not delivered to the persons who had applied for them (see, e. g., R. 201, 234, 259, 279).

In the meantime, the insured had reported for active duty and had returned to the agent the form which was previously given him, and the agent had filled in the Veterans' Administration Form 380, which the insured had signed in blank (R. 420, 585, 604, 606). The form, which was an application for benefits under the Act, was forwarded by Berenbeim (R. 410, 644) to the Veterans' Administration, a copy being sent to the insurer. In filling in the form, the agent falsely stated that a premium had been paid more than 30 days before the insured entered the

armed forces (see, *supra*, p. 7); that the policy was in the possession of the beneficiary named in it (see, *supra*, p. 8);[3] and that the form was signed by the insured on a given date at Denver, Colorado—at a time when the insured was present some other place on active duty in the armed forces (see, e. g., R. 202, 213, 235, 248, 306, 321).

On the basis of its records, the insurer submitted Form 381 to the Veterans' Administration showing that the contract was made and the first premium was paid more than 30 days prior to the insured's entry into the armed forces (R. 128, 137; see R. 940–942, 957–960). As soon as the Veterans' Administration approved the application and guaranteed the premiums, the insurer credited Berenbeim with his commission on the first year's premium and he, in turn, paid Mankoff and Schechter their commissions (R. 409–410, 162–163). While the premiums, and therefore the commissions, varied, Mankoff and Schechter received over $300 in first-year commissions on each policy they sold and Berenbeim received over $150 on each one (see R. 453–457). The extent of the agents' sales is illustrated by Mankoff's statement to an F. B. I. agent that during the month of May 1943, he sold 25 policies (R. 424), thus earning commissions of over $7,500 for the month.

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[3] Mankoff testified (R. 628) that it was his practice to state that the policy had been delivered to the insured's beneficiary, even though it had not been so delivered.

The Government's witnesses included sixteen young men who had been "sold" insurance in the manner contemplated by the conspirators. While there are some factual variations, the significant features of the conspiracy manifested themselves in each instance. Thus, for example, the witness Pepper testified that he reported for active military duty in the Army on August 26, 1943 (R. 396). About a month before this, while he was waiting to be called to active duty, petitioner Schechter undertook to "sell" him a $10,000 insurance policy (R. 396–397). Pepper testified (R. 397)—

> * * * the insurance was explained to me as a policy that contained no war clause, and that I could take out a $10,000 protection to my beneficiary, and it would have no cost to myself, and then in the event that I wanted to continue it when I got out of service, I would have two years to either convert the policy or make up my mind about it, and in the event I wanted to drop the policy I could do so with no cost to myself.

Pepper had some doubts "because I couldn't figure out how you could possibly have insurance without paying for it," but Schechter told Pepper "to leave it to him, because I wouldn't be liable for any premiums" (R. 397). On the basis of these representations, Pepper signed an application for a $10,000 policy and furnished Schechter with the requisite information concern-

ing his birthdate, beneficiary, etc. (R. 398, 912–913). The application form stated that the insurance was to be effective as of June 1, 1943, and it recited that the monthly premium of $51.20 was collected and remitted (R. 913). The form also provided that the applicant agreed that "the policy to be issued hereon shall have no binding force until actually delivered to me, and the first premium paid and accepted by the Order" (see R. 913, 769). At the same time Pepper signed (R. 399) a medical examiner's report (R. 913–921) and Veterans' Administration Form 380 (R. 921–923), both of which were filled out at a later time by Schechter and a doctor who cooperated with him (see R. 567–568, 585, 592–594). Contrary to the statement in the application form, Pepper did not pay any sum of money to Schechter (R. 398). Pepper testified further that he had not been physically examined by the doctor who certified on the medical report that such an examination had been made (R. 398–399), that when he signed the blank form he did not know what kind of insurance he was to get or the amount of the premiums (R. 399), and that he never did receive a policy of insurance (R. 399).

While there was no specific testimony as to the handling of the various forms by Schechter, it appears that they were treated in the usual manner. Schechter appears to have filled in the ap-

plication form, a "Dr. Wilkoff" signed the medical report (R. 920), and these documents were then forwarded by Berenbeim to the insurer, where they were received on June 30, 1943 (see R. 913, 921). A policy was issued by the company and forwarded to Berenbeim on July 7, 1943 (see R. 921).

On August 26, 1943, Pepper reported for active military duty (R. 396). Thereafter, Schechter filled in the Form 380 which Pepper previously had signed in blank and copies of the form were sent to the Veterans' Administration and the insurer (see R. 927, 921). In the form, which was submitted under Pepper's signature (see R. 923), Schechter stated, *inter alia,* that the last premium paid on the policy was paid July 1, 1943; that the policy was in the possession of "Joseph Pepper, 832 Garfield St., Denver, Colo."[4]; and that the form was signed by Pepper on August 29, 1943, at Denver, Colorado (R. 922–923). In truth, Pepper never had paid a premium on the policy (R. 398); he never saw the policy which was issued for him by the insurer (R. 399); and he did not sign the Form 380 on August 29, 1943, at Denver, Colorado, for at that time he was on active military duty at Fort Logan (R. 399).

On September 2, 1943, the insurer filed Form 381 with the Veterans' Administration (R. 924–927), in which it was stated, *inter alia,* that the

[4] See footnote 3, *supra*, p. 9.

policy was effective June 1, 1943; that a premium was paid on the policy on July 1, 1943; that the insurance contract was made and the first premium paid on June 1, 1943; and that the policy had been delivered to Joseph Pepper, the beneficiary. On December 9, 1943, the insurer received a Notice of Approval from the Veterans' Administration guaranteeing the premiums (R. 924).

ARGUMENT

It is manifest from the abundant evidence adduced at the trial that everyone with whom the defendants dealt was deceived, and this, it is plain, was the result contemplated by the conspiracy. The young men who "bought" insurance immediately prior to entering active military duty did so because they were led to believe that they were getting valuable protection for nothing. The insurer was induced to issue policies to the various applicants on the basis of false medical reports and apparently without knowledge that the applicants had been deceived into signing the necessary papers. And the Veterans' Administration was induced, by means of the defendants' deception, into guaranteeing the premiums on contracts of insurance which had not been made more than 30 days before the date on which the insured entered the military service and on which no premium had been paid by the insured, as the statute requires. The fraud on the insured and

the insurer have significance in the case because they were the means by which the ultimate objective of the conspiracy—the Government guarantee of the premiums—was attained. But at this juncture of the litigation it is unnecessary to dwell on anything more than the plain fraud which the defendants perpetrated on the Veterans' Administration. We turn to a brief seriatim consideration of the contentions which petitioners urge.

1. The Soldiers' and Sailors' Civil Relief Act requires as a condition to eligibility for Government guarantee of premiums that the contract of insurance shall have been made more than thirty days before the insured went on active military duty. To satisfy this condition, the conspirators caused the insurance to be back-dated. Thus, for example, in the case of the witness Betz, the testimony showed that he signed the application form on May 26 (R. 322) or May 28 (R. 320) and entered on active military duty on June 1 (R. 319). The application form requested that the policy be issued as of May 1, 1943 (R. 768–769) and the policy was so issued (see R. 380). The Veterans' Administration was thus informed that the policy was more than thirty days old when Betz entered active military service.

Petitioners point to evidence showing that it was the accepted practice of the insurer to date its policies as of either the first day of the month in which the application was made or of the fol-

lowing month (R. 100, 123, 126, 167) and they urge (Pet. 11–14) that there was nothing wrong in what they did. Indeed, they suggest that the question whether the date on the application or the date on the policy controls is a certiorari question.

It seems plain to us that the thirty-day provision in the statute was designed specifically for the purpose of eliminating from the guarantee protection afforded by the act, policies which were sold, as here, immediately preceding the insured's entry into active military service. Otherwise the thirty-day limitation has little, if any, meaning. But there is no occasion in these cases to reach that question. For the jury was instructed, at petitioners' request (R. 732–733), that the effective date of the insurance for guarantee purposes was the date on the face of the policy (R. 753–754). By this instruction the trial judge, in effect, eliminated from the case the issue whether the policies were less than thirty days old, for in each case the date on the policy was more than thirty days before the insured went on active military duty. In these circumstances, there can be no issue in this Court as to the propriety of dating back the policies or as to which date is controlling. Petitioners prevailed on this issue of law in the district court and there is thus nothing of the issue left for appellate review.

2. For the same reason, petitioners' second contention (Pet. 14–15) is without merit. Peti-

tioners' argument concerning the meaning of "date" is beside the point. For the meaning for which they contend was the one which the district court adopted. Nothing in the opinion of the circuit court of appeals suggests that, in reviewing the trial proceedings, the appellate court rejected the instruction which petitioners asked for and got in the trial court (see *infra*, pp. 24–36).

3. Petitioners' reliance (Pet. 15–16) on *Terry* v. *United States*, 131 F. 2d 40 (C. C. A. 8), as being in conflict with the decision below is misplaced. That was a case in which false statements were made to a local lending institution, which later obtained credit insurance from the Federal Housing Administration, and the court held that the defendants' false statements did not constitute a violation of the false claims statute. But the court carefully distinguished cases like *United States* v. *Gilliland*, 312 U. S. 86, where, as the court said (131 F. 2d at 45), "the defendants were shown to have knowingly made false statements in reports to an agency of the government in respect to a matter within its jurisdiction and the point involved in this case was not involved."

In these cases the defendants caused false reports to be made to the Veterans' Administration. They were not prosecuted for making false statements to the insurer or to any other outsider. The evidence summarized in the Statement shows, and petitioners do not deny, that the defendants caused the applicants to sign the Veterans' Ad-

ministration Forms 380 in blank. The defendants subsequently filled them in falsely stating that the insured had paid the last premium on the policy, that the policy had been delivered to the insured's beneficiary, and that the information was submitted by the insured who signed the statement at a given time and place. Not only did the defendants give false answers on the Form 380, but it was they who forwarded the forms to the Veterans' Administration. And thus in a real sense they made false reports to the Veterans' Administration, which, it is undisputed, had jurisdiction to administer the Soldiers' and Sailors' Civil Relief Act. The basic difficulty with petitioners' argument in this respect is that they have conveniently overlooked Form 380, without which there would not have been guaranteed premiums. In our view, submission of the Forms 380 to the Veterans' Administration was a vital step in the successful execution of the conspirators' plan. If the questions in the forms had been truthfully answered by the insured persons, there can be little question that the guarantees would not have been forthcoming.

4. In urging (Pet. 16–19) that "Any misrepresentations or false claims made to the government" were made by the insurer in the Forms 381 which the insurer filed with the Veterans' Administration, and not by them, petitioners again conveniently disregard the Forms 380 which contained false information and which they filed

with the Veterans' Administration, although the forms appeared to have been filed by the insured persons. Far from having been convicted for someone else's wrongdoing, petitioners were convicted because of what they themselves did.

5. The contention (Pet. 19–26) that petitioners' only fraud was against the insured persons and the insurer and that evidence of this fraud was the basis for their convictions disregards the fact that there would have been no incentive for the frauds on the individuals and the insurer except as a means of obtaining the issuance of insurance policies, the premiums of which would be guaranteed by the Government. Without the guarantees, petitioners obviously would not have "sold" large insurance policies to young men who were entering active military duty, and they certainly would not have paid the initial premiums on the policies, as they did. These were but preliminary steps to the obtaining of Government guarantees for the premiums and it was the fraud involved in obtaining these guarantees for which petitioners were convicted. Instead of showing fraud against individuals only, the evidence convincingly demonstrated that these were incidental frauds and that the success of the conspiracy depended upon the final step, the securing of the guarantees by deceit.

6. The fundamental assumption for petitioners' sixth contention (Pet. 26–29) that the defendants did not make any misrepresentations to the Gov-

ernment is, as we have shown, unsound. Viewing the answers contained on the Forms 380 which petitioners submitted to the Veterans' Administration "in the light of the facts existing when said document was brought to the attention of the Veterans Administration for official action" (Pet. 28), it is plain that the answers stating that the insured had paid the last premium on the policy was untrue, as were the answers stating that each policy was in the possession of the person named as beneficiary. And, finally, the defendants made it appear that the persons who signed the forms undertook the obligations contained in it (see, e. g., R. 922). But the evidence shows that the young men merely signed blank forms, not knowing their contents, and that they had no intention of undertaking to reimburse the Government for any premiums which it was required to pay. It is evident that the Veterans' Administration was misled, by the Forms 380 which were submitted, into guaranteeing the premiums on the policies, and it is equally evident that the defendants did the misleading.

7. At the close of the evidence petitioners submitted to the court 28 requested instructions. The trial judge went over each with counsel and indicated which he would give and which would be refused (see R. 727–741). The court declined Defendants' Requested Instruction No. 21 (R. 735), which read:

> If you believe from the evidence, or if you entertain a reasonable doubt upon the question that the defendants acted in good faith in the honest belief that they were doing what they had a legal right to do, you must acquit such defendants, even though the effect of what the defendants actually did was illegal.

Instead the court instructed the jury that to convict they must find that the defendants had a corrupt intent to defraud the United States. The court stated (R. 752):

> Now, intent, ladies and gentlemen, is an essential element of this crime, and you must find that any defendant had the necessary intent to violate the law. In order to find a defendant, or any of them, guilty, the jury must find beyond a reasonable doubt that they conspired with intent to defraud and with knowledge of the unlawful nature of their acts and intended to become a party to such conspiracy.
>
> Now, intent, ladies and gentlemen, is something that you cannot give any direct evidence about, so you may judge whether a man has an intent to do a certain act by his conduct and by the necessary consequences that flow from his acts in dealing with his fellow men. If you believe that any one of these defendants intended to do what he did with the intent to defraud the Government of the United States, then that is sufficient to prove that he intended that act and would justify a verdict of guilty at your hands.

And a few moments later the court reiterated the instructions on intent (R. 754), as follows:

> Intent is an essential element of the crime charged by the indictment. In order for the jury to find the defendants or any of them guilty, the jury must find that the defendants conspired with an intent to defraud and with knowledge that the claims or statements, if any, presented to the United States were false, fictitious or fraudulent. If the jury finds that the defendants had no intent to defraud the United States and did not conspire to knowingly and wilfully present a false claim or statement to the United States, then the defendants are entitled to a verdict of acquittal.
>
> One of the essential elements of this case, as I have told you, is intent. The charge is that the defendants knowingly and wilfully conspired with each other to do the acts complained of, but before there can be any conviction of any defendant in this case, you must find from the evidence beyond a reasonable doubt that such defendant or defendants had a corrupt intent and acted with full knowledge that what they did was done for the purpose of defrauding the United States.

At the close of the instructions, the court invited any further requested instructions or exceptions (R. 756). Petitioners noted some exceptions (R. 756–757) and the Government then suggested certain additional instructions (R. 757–758), in-

cluding an instruction "that good faith and honest belief is a defense, but they have to find that from all the evidence in the case." Petitioners' counsel raised additional matters in regard to the instruction, but offered no comment on the instruction on good faith which the Government suggested (see R. 758–759).

The court then further instructed the jury and included the following statement (R. 759–760):

> Also, good faith and honest belief is a defense, if you so find, after you have considered all the evidence. The charge or the violation that the defendants are charged with is found in the indictment, which you will have, and you must confine yourselves to a consideration of those charges and nothing else, because the charge is a conspiracy to attempt to defraud the United States.

Immediately upon the conclusion of the instruction on good faith, the trial judge invited exceptions and petitioners' counsel excepted to the instruction on good faith in the following terms (R. 760):

> [The COURT.] Are there any other exceptions?
>
> Mr. ROBINSON. To the last one that you mentioned, where you state again that the charge was an intent to defraud the United States, without restricting or limiting it to the material facts contained in the indictment.

Petitioners now contend that the instruction was erroneous on another ground, "in that the burden of proof is shifted to the accused" (Pet. 30). But this ground was not asserted in the trial court and, as the court below noted (R. 1050), it therefore is not now open to petitioners. Rule 30 of the Federal Rules of Criminal Procedure specifically provides that—

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

As the recital of the proceedings shows, petitioners had an opportunity to object to the terms of the instruction both when it was proposed by the Government and when it was given by the trial judge. In both instances they raised other objections, but not the one on which they now rely.

It is no answer to suggest, as petitioners do, that they had made their position known to the court three days earlier when they tendered their Requested Instruction No. 21. For in the light of the iteration and reiteration of the instructions on corrupt intent and the giving of the instruction on good faith which the Government requested, it was reasonable for the trial judge to assume that petitioners were satisfied with the instructions as given. This is particularly so, because petitioners were given ample opportunity to

except to the instruction and they did not do so on the ground on which they now rely. A defendant may not excuse his acquiescence in an instruction by showing that at an earlier stage in the proceedings he had taken a different position. Particularly where the objection is as technical as that which petitioners now urge, it should have been distinctly stated to the trial judge, as Rule 30 requires.

In view of the overwhelming strength of the evidence of guilt and in view of the court's emphasis on the element of corrupt intent as an ingredient of the offense, it is difficult to believe that the instruction to which petitioners now object played any substantial part in tipping the scales against them.

8. In their final contentions (Pet. 31–32) petitioners return to the question of back-dating the insurance policies. As has been shown, *supra*, p. 15, the trial court instructed the jury that the date on the policy controlled and that petitioners' practice in this respect was unobjectionable. Petitioners now urge that the circuit court of appeals reached a contrary conclusion and that their convictions were affirmed on a different theory of the case than was submitted to the jury. Reference to the opinion of the court below demonstrates that petitioners are mistaken.

After summarizing the evidence (R. 1043–1046) and setting forth the relevant statutory provisions (R. 1041–1043, 1046), the circuit court

of appeals characterized the conspiracy as follows (R. 1047):

> * * * The scheme apparently designed, patterned, and carried out with deliberate care involved from the very outset much more than merely dating policies back to the first day of the current month in which the applications were submitted and the paying of the first premium on them. It was saturated with falsity and concealment. The prospects were told in substance that they could obtain the insurance coverage without cost or liability. The obligation to reimburse the government for premiums paid was carefully concealed. The applications for insurance were held until the strategic time arrived and were then filled out. The reports of medical examination were faked. Certain material information given in the applications for benefits under the Act was misleading and deceptive. And as contemplated by the defendants, the reports of the insurance company contained statements or representations similar to the misleading and deceptive representations contained in the applications for benefits under the Act in respect of the time the insurance had been in effect and a premium paid thereon. All of that was done for the purpose of bringing about the guarantee of the premiums, after which the defendants would reap their financial reward. An agreement to enter into such a concert of action for that

> ultimate end attended by one or more overt acts by one or more of the parties constitutes a conspiracy to defraud the United States, in violation of section 37, supra.

In the light of these words, it can hardly be seriously contended that petitioners' convictions were affirmed because the circuit court of appeals thought it was wrong for them to date back the policies which they sold. At no place in the opinion did the appellate court express disapproval of the theory of the case in the trial court. Indeed, it reiterated the theory of the trial judge (cf. R. 490–491, 726–727 with R. 1046–1047). The theory of the case has been the same in the district court and in the circuit court of appeals.

CONCLUSION

On the record, the guilt of petitioners is convincingly established. The contentions which petitioners urge fail to demonstrate in any respect that they were not fairly tried and convicted. We therefore respectfully submit that the petition for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

JANUARY 1948.

APPENDIX

1. The Soldiers' and Sailors' Civil Relief Act, as amended, 56 Stat. 773 (50 U. S. C. App., Supp. V, 540-548) provides in pertinent part:

SEC. 400. As used in this article—

(a) The term "policy" shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article I of this Act or which does not contain any limitation or restriction upon coverage relating to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon before the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 or not less than thirty days before the date the insured entered into the military service. The provisions of this Act shall not be applicable to policies or contracts of life insurance issued under the War Risk Insurance Act, as amended, the World War Veterans' Act, as amended, or the National Service Life Insurance Act of 1940, as amended. * * *

SEC. 401. The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured is outside

the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder. The Veterans' Administration shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed $10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of $10,000, the Administrator is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed $10,000, and a policy which affords the best security to the Government shall be given preference.

SEC. 402. Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Veterans' Administration may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall

furnish such report to the Veterans' Administration concerning the policy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to such modification of the policy as may be required to give this article full force and effect with respect to such policy.

SEC. 403. The Administrator of Veterans' Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest.

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SEC. 407. The Administrator of Veterans' Affairs is hereby authorized and directed to provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Administrator of Veterans' Affairs in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government. The Administrator of Veterans' Affairs shall report annually to the Congress on the administration of this article.

2. Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

3. Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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